No. 12,152

IN THE

United States Court of Appeals

For the Ninth Circuit

WALTER A. SHAYLOR and
GLADYS SHAYLOR,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
C. ELMER COLLETT,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California.
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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INTRODUCTION.

Appellants on page 1 of their brief state they are prosecuting this appeal "contending that a new trial should be granted appellants on the issues of damages only".

On page 5 they state the questions on appeal are whether or not the trial Court erred: (1) in its rulings as to admission of certain evidence; and (2) as to the findings of fact and conclusions of law as to damages general and special.

FACTS.

Gladys Shaylor by her guardian ad litem on February 18, 1947 filed a complaint against the United States of America under the Federal Torts Claims Act for damages for personal injuries received on the 5th day of March, 1946 allegedly as a direct and proximate result of the negligence of an employee of the United States of America acting within the scope of his authority in the operation of a Dodge truck, the property of the United States of America. Appellant claimed she was struck by the truck while crossing Van Ness Avenue at McAllister Street, in San Francisco, California.

The Court found there was negligence on the part of the Government employee and rendered a judgment for $500.00 general damages and $460.25 special damages. Appellant filed a motion for a new trial, which was denied. The Court, however, in denying the motion, increased the general damages to the sum of $1000.00. The total amount of the judgment from which this appeal is taken is $1460.25.

CONTENTIONS.

Appellants' appeal addresses itself to two principal points:

(1) inadequacy of special damages

(2) inadequacy of general damages

In the specification of errors, ten assignments of error have been made. Assignments of error 1, 2, 3,

5, 6, 8 and 10 relate to inadequacy of special damages, and assignments of error 3, 4, 5, 7 and 9 relate to inadequacy of general damages.

Appellee contends that the appeal in this case is wholly without merit and the judgment of the District Court should be affirmed.

ARGUMENT.

I.

THE DECISION OF THE TRIAL COURT IS SUPPORTED BY THE EVIDENCE AND CANNOT BE DISTURBED WHERE NOT PLAINLY ERRONEOUS.

In *United States v. Chicago R. I. & P. Ry. Co.,* 171 F.2d 377, 380, Judge Bratton of the Tenth Circuit stated:

> "In the trial of a nonjury case, it is the province of the trial court to observe the witnesses while testifying to judge their qualifications, to appraise their credibility, to determine the weight to be given their testimony, to draw reasonable inferences from the facts established, and to resolve conflicts in the evidence, both direct and circumstantial. It would not serve any useful purposes to detail the evidence adduced upon the trial of this case. It is enough to say that the evidence and the reasonable inferences fairly to be drawn from it were sufficient to support the findings, including the finding that the amount paid to Eitel was reasonable, and they were not plainly erroneous."

Neil v. Gross, 101 F.2d 153;

McDonald v. Capital Co. (CCA-9th), 130 F.2d 311, cert. den. 317 U.S. 692;

Wingate v. Bercut (CCA-9th), 146 F.2d 725;
Augustine v. Bowles (CCA-9th), 149 F.2d 93;
Savage v. Loraine (CCA-9th), 148 F.2d 818, cert. den. 325 U.S. 885;
Lerner Stores Corp. v. Lerner, 162 F.2d 160;
Faivret v. First Nat. Bank, 160 F.2d 827.

The Court in its decision (Tr. 93-94) stated: "I do not think there is any permanent injury. I also think the pain and suffering was rather slight."

Appellant's doctor testified (Tr. pp. 34-35) that in August, 1943 appellant was operated and a chronic appendix removed. In October, 1943 appellant again reported to his office (Tr. 55) and complained of bowel discomfort and passage of acholic stools. A diagnosis of mild cholecystitis was made. A short time after because of evident upset and considerable menstrual discomfort she was again brought to the office by her mother. The condition was attributed to an unbalanced thyroid gland, and in turn the increase in size of her ovaries resulting in pain increasing at the termination of the menstrual flow. She was placed in thyroid management which resulted in diminution of the menstrual pain. She still complains of the menstrual pain not to the constant degree she did before (Tr. 55). It is variable now. She has been continued on thyroid.

On February 2, 1948 appellant again reported to the doctor's office (Tr. 36) and complained of acute abdominal pains, and a tentative diagnosis of Meckles diverticulum was made, and on February 9th she was operated and obstruction found in her small bowel.

On cross-examination the doctor (Tr. 57) defined Meckles diverticulum:

> "Referring back to fetal life again, that is a bowel connection through the uterine, the umbilical stock and the placenta; at birth immediately within the peritoneal cavity a portion of that stock drops off, in dropping off in most cases it is absorbed into the bowel structure but again occasionally it is not absorbed and it will give rise to a so-called left side appendicitis. It has all the structure of the normal bowel and can be of varying size from one inch to several inches in height."

With regard to the cause of the obstruction, the doctor (Tr. 57) said:

> "I cannot state. There were no adhesions at that point, no density at that point other than two lobes to the bowel producing obstruction, it might have been an old site of Meckles. I would not ascribe it to any entity other than to say it produced the obstruction and the patient later was relieved."

The doctor further testified (Tr. 60):

> "She is classified as polyglandular; there is a deficiency in the thyroid secretion evidenced by the distribution of fatty layers and the distortion of her menstrual cycle and to a marked degree she has been helped by the thyroid medication."

Dr. Carruth Wagner, an orthopedic specialist with the United States Public Health Service, made an examination in behalf of appellee and testified as a witness for appellee. He stated (Tr. 84) that appel-

lants' attorney, Mr. Gearhart, was present during the entire oral examination of appellant Gladys Shaylor and that she did not advise him that she had gall bladder trouble prior to the accident, that she had an appendectomy in 1943, and that she was under treatment for a thyroid condition. Dr. Wagner testified (Tr. 88):

> "From an overall picture, this patient at the time of this examination on the basis of the film and the physical examination showed two positive things, she shows evidence of some metabolic disturbance that causes these upsets, it is not normal within limits for a girl of her age; second, that she had some disturbance within the pelvis that would give her this pain in menstruation that is not associated with the pelvis. It is unlikely that it would be orthopedic, but a condition that we can attribute to her uterus or ovaries or a relationship between the two."

Dr. Wagner further testified (Tr. 89):

> "I see no evidence of injury, she shows some disproportion, because of the size of the ridge here (indicating) between the left and right and some irregularity that is present on the latter film but no indication of fracture or separation of the symphysis pubis, no disproportion here (indicating). Since that disproportion takes place in fracture rather than separation on the symphysis I would not say these show any trauma to the bone."

And again (Tr. 90):

> "I would say that she had recovered from any injury she received to her pelvis, skull or spine."

The testimony of Dr. Sullivan and Dr. Wagner adequately support the Court's findings that there was no permanent injury and that the pain and suffering were very slight and that the award of $1000.00 was adequate.

The Court's attention is expressly called to the failure to reveal the past history of appellant Gladys Shaylor to Dr. Wagner at the time of his examination, also to the attempt to lead the lower Court to believe that the operation of February 9, 1948 was related to the accident of March 5, 1946.

II.

THE JUDGMENT AS TO SPECIAL DAMAGES IS ADEQUATE AND IS SUSTAINED BY THE EVIDENCE.

(1) Appellant states: "It is error for the trial court to admit evidence of accident insurance or any other insurance in behalf of the injured person to mitigate the damages."

This specification of error is founded upon a complete misconception of the purpose of the questions and the basis of the Court's ruling. But notwithstanding any question of subrogation that might possibly have entered the case, the matter became entirely irrelevant when the Court in its decision (Tr. 94) said:

> "There is one matter bothering me some; I haven't taken into account nor considered the amount shown by the evidence at one place to be paid by the insurance company; perhaps I should

determine that. But in the latter part of the case the government felt that it was immaterial and made objection which was sustained so I didn't make any determination of that matter."

The Court further said:

"After going over the evidence and giving the plaintiff the benefit of some allowances where it is rather questionable, I will fix the special damages at $460.25."

The Court further states (Tr. 93):

"I am satisfied in this case that this plaintiff has not lost anything financially through loss of work. There is no evidence to show that she needed her sick leave for any other purpose which caused her any loss. I am satisfied that there has been testimony submitted here that should not be considered by the court. Some of the witnesses have been rather evasive. I think some of them knew some facts that they could have testified to if they had wanted to. I don't believe people are paying out over $100.00 in amounts and then not knowing whether they paid it or not."

The medical picture of this case is confused by the fact that appellant Gladys Shaylor is "polyglandular" and suffers "deficiency in the thyroid secretion" and "distortion of her menstrual cycle". Add to this her left and right appendix trouble, together with Meckles diverticulum, with the operations performed in 1943 and 1948, and a wilful failure to inform appellee's doctor of the previous history of appellant, all of which elements were in no wise related to the alleged

injuries of March 5, 1946, it becomes obvious that the lower Court was exceedingly generous in allowing $460.25.

Appellants' amendment to Paragraphs II, VII and IX of Complaint (Tr. 7) sets forth the items of Special Damages.

(a) *Hospital St. Mary's $211.85.* There is no evidence in the record to prove the reasonable value of the hospital services as related to the accident. Walter A. Shaylor testified (Tr. 92) he paid the difference between $150.00 and $211.75, although he previously stated he paid $211.85 (Tr. 72).

The correct measure of damages for medical and hospital treatment, drugs, etc., incurred because of personal injuries is their reasonable value, rather than the amounts actually paid for them.

8 *Cal. Jur.* 813;
82 *A.L.R.* 1325.

Amounts paid on account of medical treatment and attention is some evidence of reasonable value thereof in the absence of showing to the contrary.

Dewhurst v. Leopold, 194 Cal. 424.

Dr. Sullivan testified (Tr. 59):

> "She has been continued on thyroid, the latter part of that has no connection with this, it has been billed to the California Physicians Service for services rendered."

There is no showing whatsoever as to the reasonable value of the hospital services as related to this case.

(b) *Dr. John Robert Sullivan,* Medical Service $600.50.

This sum was broken down (Tr. 41-42) to the following:

(1) 3/5/46 Emergency Hospital Examination, emergency treatment for shock. 3/5/46 St. Mary's Hospital care and attention 3/5/46 to and including 3/22/46 orthopedic management; fractured pelvis, right shoulder injury, right leg and right ankle injury, genito-urinary treatment and investigation, neuro surgical management hospital calls. $200.00.

(2) Medical management 2/23/46 to and including 12/31/46. Examination, physiotherapy, consultation $110.50.

(3) Medical Services 1/1/47 to and including 12/31/47. Examination, treatments, medical reports submitted in this case $140.00.

(4) Medical Services 1/1/48 to and including 4/12/48 Examination, consultation $50.00

(5) Court testimony $100.00.

Appellant Gladys Shaylor testified (Tr. 71) in reply to a question by the Court:

"The Court: I understand your entire doctor bill was $250.50 for this period to December 31, 1947. That is the entire doctor bill?

A. That is correct."

It is evident from the testimony of Dr. Sullivan, Walter Shaylor and Gladys Shaylor that there is a

considerable overlap in charges made for treatment of the alleged injuries of the accident and treatments for the glandular deficiencies, gall bladder, menstrual and bowel trouble of Gladys Shaylor. Appellants obviously have endeavored to throw in everything possible whether related to the accident or not.

The lower Court (Tr. 83) made this observation: "It is the plaintiff's duty to put in the case to establish these matters. It seems to me that this plaintiff destroys all the evidence now in regard to the bills."

(c) *Dr. John Robert Sullivan, surgical, Feb. 26, 1948, $250.00.*

This charge was made for the operation in February, 1948. The record is clear that this operation was not related to the accident. Including the charge of $250.00 as an item of expense in this case was highly improper.

(d) *Twenty-eight days off work,* $187.38.

Appellant was employed by the United States of America in the Internal Revenue Department at the time of the accident. She testified (Tr. 66) that she received her regular pay check during the entire period she was off work. She used her sick leave to cover the time she was off work. There is no proof of loss of wages and appellant made no claim of such in her brief.

(e) *Medicine to date,* $20.00.

Walter Shaylor (Tr. 92) was asked if he paid the $20.00 for the medicine and he answered: "We paid

for lots of medicine." "I paid so many medicine bills I don't recall what you are talking about." (Tr. 93.)

"Q. You have made the allegation in your complaint?

A. Yes.

Q. Did you read it?

A. Yes, sir.

Q. Did you know the contents of it?

A. I cannot recall it at this time.

Q. This was sworn to on the 3rd of April, 1948.

A. It must be but I don't recall it."

CONCLUSION.

It is submitted that there is no merit to the appeal in this case, that the evidence is adequate to support the judgment of the trial Court both as to special and general damages.

Dated, San Francisco, California,
May 25, 1949.

FRANK J. HENNESSY,
United States Attorney,
C. ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellee.